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control or due to a change in circumstances which makes the completion of its program economically unfeasible.

[41 FR 4265, Jan. 29, 1976, as amended at 73 FR 56740, Sept. 30, 2008]

§ 390.11 Sale or other disposition of agreement vessels.

(a) *Eligible agreement vessels.* The sale or other disposition (including mortgages) of eligible agreement vessels shall not require prior approval of the Maritime Administrator, but shall require written notification within 10 days after the sale or other disposition. Such notification shall include a description of the transaction, the identity of the transferee, the proceeds to be realized, the date of the transaction and whether the proceeds will be deposited into the fund.

(b) *Qualified agreement vessels—(1) In general.* If a qualified agreement vessel whose basis has been reduced through the application of qualified withdrawals is sold or disposed of (including mortgaged) within one year, interest on the amount of gain attributable to the basis reduction shall attach if the Maritime Administrator determines that the disposition was contrary to the policies of the Act, the joint regulations or these regulations. See § 390.13 (relating to failure to fulfill a substantial obligation under the agreement).

(2) *Period of one year defined.* The one-year period shall mean 365 days from the date of final delivery from the shipyard in the case of construction or reconstruction and 365 days from the date of first loading of the vessel in the case of an acquisition.

(3) *Prior approval.* The party shall obtain the written approval of the Maritime Administrator prior to the sale or other disposition (including mortgage) of a qualified agreement vessel.

(4) *Deposit requirement.* The Maritime Administrator will not normally require the deposit of the net proceeds from the sale of a qualified agreement vessel but shall require the deposit of the net proceeds from the mortgage of a qualified agreement vessel for which qualified withdrawals from the fund have been made.

(c) *Sale or other disposition of agreement vessels to related persons—(1) In*

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general. Section 3.2(c)(4) of the joint regulations (§ 391.2(c)(4) of this chapter) requires that the net proceeds from the sale or other disposition of an agreement vessel shall be the fair market value of the vessel when the party and the purchaser are owned or controlled directly or indirectly by the same interests within the meaning of section 482 of the Internal Revenue Code of 1986, as amended, and the regulations thereunder. In such case, the party shall furnish data to establish that the amount realized or to be realized is the fair market value.

(2) *Data to be submitted.* Sufficient data must be submitted to support a determination by the Maritime Administrator of the fair market value including the original cost of the vessel, dates of original delivery, acquisition and reconstruction, as applicable, cost of improvements, sales price, costs of sale and any other information which would assist in making such determination.

[41 FR 4265, Jan. 29, 1976, as amended at 73 FR 56740, Sept. 30, 2008]

§ 390.12 Liquidated damages.

(a) *Liquidated damages—(1) In general.* Each agreement entered into under Chapter 535 shall contain a liquidated damages provision for the purpose of placing the party into its prefund position for each day a qualified agreement vessel is operated in violation of the geographic trading restrictions contained in the Act and § 390.5. The liquidated damages provision requires that the party repay the time value of the deferral of Federal Income Tax which the party has received.

(2) *Calculation of liquidated damages.* The liquidated damages specified in this paragraph shall be calculated as follows:

(i) With respect to each vessel operated in violation of the applicable trading restrictions, add (A) the sum of qualified withdrawals for the vessel which have been made from the ordinary income and capital gain accounts to the date of breach, and (B) the amount of any unpaid principal on indebtedness for the vessel which may be paid from the fund less any portion of such amount which by operation of law

must be withdrawn from the capital account balance on deposit in the fund on the date of the breach.

(ii) Multiply the total derived in paragraph (a)(2)(i) of this section by an assumed effective Federal Income Tax rate of 30 percent;

(iii) Compound the product derived in paragraph (a)(2)(ii) of this section at 8 percent annually (A) for 20 years, if the duration of the trading restrictions applicable to the vessel is 20 years in accordance with paragraph (b)(1)(i) of this section; (B) for 10 years, if the duration of the trading restrictions applicable to the vessel is 10 years in accordance with paragraphs (b)(1) (ii), (iii) or (iv) of this section; or (C) for 5 years, if the duration of the trading restrictions applicable to the vessel is 5 years in accordance with paragraph (b)(1)(iv) of this section.

(iv) Subtract the amount calculated in paragraph (a)(2)(ii) of this section from the product derived in paragraph (a)(2)(iii) of this section;

(v) Divide the result derived in paragraph (a)(2)(iv) of this section by 2; and

(vi) Divide the result derived in paragraph (a)(2)(v) of this section (A) by 7300 (days) if the duration of the trading restrictions applicable to the vessel is 20 years; (B) by 3650 (days) if the duration of the trading restrictions applicable to the vessel is 10 years; or (C) by 1825 (days) if the duration of the trading restrictions applicable to the vessel is 5 years.

(3) *Formula.* The calculation of the daily rate of liquidated damages may be reduced to the following formula:

$$X = [I(QT) - S]/2D$$

Where:

X = Daily rate in dollars.

Q = Summation of qualified withdrawals, other than withdrawals from the capital account, permitted from the fund.

T = Assumed effective tax rate of 30 pct.

S = Tax savings = $(Q)(T)$.

I = Discount factor to be applied for vessels subject to 20-yr trading restriction = 4.660957; for vessels subject to 10-yr trading restriction = 2.158925; for vessels subject to 5-yr trading restriction = 1.469328 (value of \$1 compounded at 8 pct for 20, 10, and 5 yr respectively).

D = 7,300 d for vessels subject to 20-yr trading restriction; 3,650 d for vessels subject to 10-yr trading restriction; 1,825 d for vessel subject to 5-yr trading restriction.

The formula may be further reduced to:

$$X = 0.5491436Q/7,300$$

for vessels subject to 20 year trading restriction,

$$X = 0.1738388Q/3,650$$

for vessels subject to 10 year trading restriction,

$$X = 0.0703992Q/1,825$$

for vessels subject to 5 year trading restriction.

(4) *Example.* The provisions of paragraphs (c)(2) and (c)(3) of this section may be illustrated by the following example:

Assume that a qualified agreement vessel has been constructed with qualified withdrawals from a fund. The total cost was \$20 million of which \$6 million was withdrawn from the fund for a downpayment. Pursuant to the agreement, an additional \$4 million may be withdrawn from the fund to pay principal on indebtedness. Thus, \$10 million has been or may be withdrawn from the fund with respect to this vessel. The daily rate of liquidated damages would be:

$$X = 0.5491436 (10,000,000)/7300 \text{ or } X = \$752.25$$

(5) *Payment of liquidated damages.* The amount derived in paragraph (a)(2) of this section shall be the daily rate of liquidated damages and shall be paid to the Maritime Administrator, for deposit in the Treasury of the United States, within 30 days from the date the qualified agreement vessel first entered the prohibited geographic trade and shall be for all amounts owing from such date thereafter until the date payment is due. Payments, for continuing breaches, shall be made at 30 day intervals.

(6) *Other remedies.* Nothing in this paragraph shall diminish the Maritime Administrator's other remedies for breach under the Act, the rules and regulations or the agreement.

(b) *Duration of restrictions—(1) In general.* The geographic trading restrictions in the Act and §390.5 and the liquidated damages provision shall apply for:

(i) 20 years from the date of final delivery on qualified agreement vessels constructed or acquired within one year of final delivery from the shipyard with the aid of qualified withdrawals;

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(ii) 10 years from the date of completion of reconstruction for qualified agreement vessels reconstructed with the aid of qualified withdrawals;

(iii) 10 years from the date of acquisition of qualified agreement vessels acquired with the aid of qualified withdrawals more than one year after final delivery of the vessel from the shipyard;

(iv) 10 years from the date of the first qualified withdrawal from the fund to pay the existing indebtedness on a qualified agreement vessel which was included in Schedule B for that purpose unless the qualified vessel was more than fifteen years old on the date of the first qualified withdrawal in which case the period shall be five years.

(2) *Transfer of qualified agreement vessel.* In the event a qualified agreement vessel is sold or transferred to another person (see paragraph (b)(3) of § 390.11 requiring prior permission), the transferor shall require in the bill of sale that the transferee agree with the Maritime Administrator to comply with the geographic trading restrictions and to pay liquidated damages for any breach of such agreement that occurs after the transfer. The transferor shall remain liable for any violations that occurred prior to the approved transfer. However, in the case of a like kind exchange which is governed by section 1031 of the Internal Revenue Code of 1986, as amended, if the vessel acquired by the party has an economic life equal to or greater than the length of the geographic trading restrictions that remain applicable to the transferred vessel, the acquired vessel shall be deemed to be a qualified agreement vessel and the geographic trading restrictions of the transferred vessel shall attach to the acquired vessel.

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§ 390.13 Failure to fulfill a substantial obligation under the agreement.

(a) *In general.* 46 U.S.C. 53509(c) requires the Maritime Administrator to determine whether there has been a failure to fulfill a substantial obligation under an agreement.

(b) *Contracting Officer's tentative conclusion*—(1) *Notice.* If the Contracting Officer tentatively concludes that any

substantial obligation under the agreement, the joint regulations or these regulations is not being fulfilled by the party he shall serve written notice of his tentative conclusion upon the party by certified mail with return receipt requested. The notice shall contain the following information:

(i) A statement of the grounds upon which the tentative conclusion is based;

(ii) The amount the Contracting Officer tentatively concludes should be withdrawn as a nonqualified withdrawal; and

(iii) A statement that the tentative conclusion shall become a final decision unless the party requests, within 30 days, an opportunity either to cure its breach or to be heard and offer evidence in opposition to the tentative conclusion.

(2) *Effect of notice.* The notice of the tentative conclusion shall become a final decision as described in paragraph (d)(1) of this section, unless within 30 days of receipt of such a written notice the party by personal delivery or by certified mail, requests the opportunity either to cure its breach or to be heard and offer evidence in opposition to the tentative conclusion, in which case no further withdrawals from the fund, without the written prior approval of the Contracting Officer, shall be made by the party until a binding final decision is reached by the Maritime Administration.

(c) *Basis for Contracting Officer's tentative conclusion.* In determining whether a party has not fulfilled a substantial obligation under its agreement, the Contracting Officer shall consider among other things:

(1) The effect of the party's action or omission upon its ability to either carry out the purpose of the fund, accomplish its Schedule B program (see § 390.4(c)) or satisfy its minimum level of deposits in Schedule D (see § 390.4(e)).

(2) Whether the party has made material misrepresentations in connection with its application, agreement or any modification or amendment thereto or has failed to disclose material information that may affect its agreement or the purpose of the fund.